

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., et al. )

Plaintiff, )

vs. )

TYSON FOODS, INC., et al. )

Defendants and )  
Third-Party Plaintiffs, )

Case No. 05-CV-0329-JOE-SAJ

vs. )

CITY OF TAHLEQUAH, et al. )

Thirty-Party Defendants. )

**THIRD-PARTY DEFENDANT, WAUHILLAU OUTING  
CLUB'S SPECIAL APPEARANCE AND  
MOTION TO DISMISS AND BRIEF IN SUPPORT**

Third-Party Defendant, Wauhillau Outing Club, pursuant to Rules 4(m) and 12(b)(5) of the Federal Rules of Civil Procedure, hereby files this Special Appearance and Motion to Dismiss the Third Party Complaint for insufficiency of service of process and for failure to effect service within the required time period. In support of this Motion, Third-Party Defendant, Wauhillau Outing Club, alleges and states as follows:

1. Third-Party Defendant, Wauhillau Outing Club ("Wauhillau Outing Club"), is a not-for-profit corporation duly organized and existing under the laws of the State of Oklahoma.

2. On October 4, 2005, Defendants and Third-Party Plaintiffs filed a Third Party Complaint in this action.

4. On March 15, 2006 – approximately 160 days after filing the Third Party Complaint – Defendants and Third-Party Plaintiffs caused a third party summons to be issued and mailed, along with the Third Party Complaint, to: Wauhillau Outing Club at P.O. Box 1286, Muskogee, Oklahoma 74401.

5. Under Rule 4(h) of the Federal Rules of Civil Procedure, this mailing does not constitute proper service of process upon a domestic corporation. No proof of service has been filed in this case.

6. In addition, Defendants and Third Party Plaintiffs have failed to effect service upon Wauhillau Outing Club within 120 days after the filing of the Third Party Complaint, as required under Rule 4(m) of the Federal Rules of Civil Procedure.

7. For the reasons stated herein, this Court should dismiss the Third Party Complaint in respect of Wauhillau Outing Club or, in the alternative, quash service of the third party summons and the Third Party Complaint in favor of Wauhillau Outing Club.

### **ARGUMENT AND AUTHORITIES**

#### **A. Service of Process is Insufficient.**

Rule 4(h)(1) of the Federal Rules of Civil Procedure provides, in relevant part, that service upon domestic corporations from which waiver of service has not been obtained and filed, like Wauhillau Outing Club, shall be effected as follows:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendants...

Here, Defendants and Third Party Plaintiffs never attempted to obtain service by delivering the third party summons and a copy of the Third Party Complaint to Wauhillau Outing Club's registered agent. Nor has the third party summons and a copy of the Third Party Complaint ever been delivered to any officer, managing or general agent, or to any other agent authorized to receive service of process on behalf of Wauhillau Outing Club. Rather, on March 15, 2006, Defendants and Third Party Plaintiffs simply mailed the third party summons and a copy of the Third Party Complaint to a post office box mailing address maintained by Wauhillau Outing Club. Under Rule 4(h)(1), this does not constitute proper service of process upon Wauhillau Outing Club. 12 O.S. § 2004(C)(2) provides that service by mail may be effected upon a corporation "*by mailing a copy of the summons and petition by certified mail, return receipt requested and delivery restricted to the addressee.*" (emphasis added).<sup>1</sup>

Therefore, this Court should dismiss the third party complaint against Wauhillau Outing Club for insufficiency of service of process or, in the

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<sup>1</sup> Under F.R.C.P 4(h)(1), service of process may be obtained upon a corporation "in the manner prescribed for individuals by subdivision (e)(1)," which, in turn, allows service upon an individual "pursuant to the law of the state in which the district court is located." F.R.C.P 4(e)(1). Accordingly, 12 O.S. § 2004(C)(2) controls the manner in which service of process may be obtained upon a corporation by mail.

alternative, quash service of the third party summons and the Third Party Complaint in favor of Wauhillau Outing Club.

**B. The Time Limit for Service Has Expired.**

Rule 4(m) of the Federal Rules of Civil Procedure provides, in relevant part, that:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time...

Here, Defendants and Third Party Plaintiffs filed a Third Party Complaint on October 4, 2005. On or about March 15, 2006 – more than 160 days after the filing of the third party complaint – Defendants and Third Party Plaintiffs mailed a third party summons and a copy of the Third Party Complaint to the post office box address maintained by Wauhillau Outing Club. As of the date of this motion – over 220 days after the filing of the Third Party Complaint – Defendants and Third Party Defendants have yet to obtain proper service of process upon Wauhillau Outing Club. Accordingly, this Court should dismiss the Third Party Complaint as to Wauhillau Outing Club.

Respectfully submitted,

/s/ Reuben Davis

Reuben Davis, OBA #2208  
Boone, Smith, Davis, Hurst & Dickman  
500 ONEOK Plaza  
100 West Fifth Street  
Tulsa, OK 74103  
(918) 587-0000—Telephone  
(918) 599-9317—Fax

Attorneys for Defendant, Wauhilla  
Outing Club

**CERTIFICATE OF MAILING**

I hereby certify that on May 19, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and served the foregoing by mail on the following, who are not registered participants in the ECF System:

**Jim Bagby**  
RR 2, Box 1711  
Westville, OK 74965

**Gordon W. Clinton**  
23605 S GOODNIGHT LN  
WELLING, OK 74471

**Susann Clinton**  
23605 S GOODNIGHT LN  
WELLING, OK 74471

**Eugene Dill**  
P O BOX 46  
COOKSON, OK 74424

**Marjorie Garman**  
5116 Highway 10  
Tahlequah, OK 74464

**James C Geiger**  
RT 1 BOX 222  
KANSAS, OK 74347

**Thomas C Green**  
Sidley Austin Brown & Wood LLP  
1501 K ST NW  
WASHINGTON, DC 20005

**G Craig Heffington**  
20144 W SIXSHOOTER RD  
COOKSON, OK 74427

**John E. and Virginia W. Adair Family Trust**  
RT 2 BOX 1160  
STILWELL, OK 74960

**Dorothy Gene Lamb**  
Route 1, Box 253  
Gore, OK 74435

**James Lamb**  
Route 1, Box 253  
Gore, OK 74435

**Doris Mares**  
P O BOX 46  
COOKSON, OK 74424

**William H Narwold**  
Motley Rice LLC (Hartford)  
20 CHURCH ST 17TH FLR  
HARTFORD, CT 06103

**Donna S Parker**  
34996 S 502 RD  
PARK HILL, OK 74451

**Richard E Parker**  
34996 S 502 RD  
PARK HILL, OK 74451

**C Miles Tolbert**  
Secretary of the Environment  
State of Oklahoma  
3800 NORTH CLASSEN  
OKLAHOMA CITY, OK 73118

**Robin L. Wofford**  
Rt 2, Box 370  
Watts, OK 74964

/s/ Reuben Davis

WITHDRAWN